



SCHOOL OF LAW
CASE WESTERN RESERVE
UNIVERSITY

Case Western Reserve Law Review

Volume 19 | Issue 3

1968

The Criminal Trial Process--The Fight for Truth

Alan B. George

Wilbure C. Leatherberry

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Alan B. George and Wilbure C. Leatherberry, *The Criminal Trial Process--The Fight for Truth*, 19 Case W. Res. L. Rev. 713 (1968)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol19/iss3/9>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

NOTE

The Criminal Trial Process — The Fight for Truth

WHEN THE REVOLUTIONARY Galileo left the circle of debating Scholastics to put their intellectualized hypothesis to test by actually dropping two objects of a like shape but different weight from the Leaning Tower of Pisa, a new and startling technique was established in the methodological search for truth. Although the Scholars were not particularly receptive to the new empirical data, the prevailing Aristotelian notion, that the body having the greater weight would fall faster, was disproved.¹ Science, as anyone knows, has long since adopted the experimental method and even though "scientists themselves are not always possessed of clear and sound ideas" of the nature and application of the scientific method, it has proved to be most useful.² The law has remained considerably more adamant in its Scholastic posture. This is not to say that the position assumed by the law has been the wrong one — on the contrary, scientific alternatives have simply not been available. But a small-scale Copernican Revolution for the law now seems to be well along the way; and the profession must be prepared to welcome changes that promise to elevate human dignity.

The revolution referred to is composed of multifarious developments in several dissimilar areas of research that permit the development of a superior factfinding methodology. The researchers are psychiatrists, psychologists, sociologists, behavioral scientists, legal scholars, and polygraph experts. Much of what they are contributing to the factfinding process is not adaptable to the present-day trial, either because the contribution is not fully advanced, or because the law is not ready for it. The purpose of this Note is to acquaint the legal profession with some of the research under way, and explore and anticipate selected problems that will inhibit an easy transition from the trial of the present to the trial of the future.

¹ C. BRINTON, *THE SHAPING OF THE MODERN MIND* 93 (Mentor ed. 1959). "Galen, relying largely on the Bible, taught that man has one more rib than woman. For hundreds of years physicians accepted that dogma. Then Vesalius had the temerity to dissect the dead bodies of men and women." J. FRANK, *COURTS ON TRIAL* 71 (1949).

² M. COHEN, *STUDIES IN PHILOSOPHY AND SCIENCE* 48 (1949).

I. THE CRIMINAL TRIAL PROCESS

A. *Fog and Mud*³

Our American trial process is a somewhat frightening mystery to the average layman. Quoting with approval the words of an eminent jurist, Judge Jerome Frank discussed the problem as follows:

"If," said Judge Learned Hand to the lawyer, "you lead your client into the courtroom with you . . . you will, if you have the nerve to watch him, see in his face a baffled sense that there is going on some kind of game which, while its outcome may be tragic to him in its development, is incomprehensible." The legal profession should not take much pride in a system which evokes from Judge Hand the remark, "About trials hang a suspicion of trickery and a sense of result depending on cajolery or worse." To Judge Hand's comments I would add that were it impossible to contrive a better system, we lawyers could legitimately defend ourselves, saying, "We do the best we can." But I think such a defense not legitimate because I think we do not do the best we can . . .⁴

In this Note we propose to examine the present criminal trial process to determine how it may be improved.

Recent Supreme Court decisions extending and amplifying the Bill of Rights via the due process clause seem to be directed toward ensuring a fair contest between the State and the defendant.⁵ The equal protection clause has also been used to promote greater equality in the strength of the combatants.⁶ Our system of criminal law is accusatorial rather than inquisitorial⁷ and an attempt is made to protect the accused from false, unwarranted accusations.

The Supreme Court has stated that "the basic purpose of a trial is the determination of truth,"⁸ and has recognized that the protection of individual liberties frequently interferes with the process of ascertaining truth in a criminal case.⁹ It is apparent that the prem-

³ The source of this phrase is a passage from Dickens on the subject of the chancery court: "Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which the High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth." 1 C. DICKENS, *BLEAK HOUSE* 2 (Collier ed. 1964).

⁴ J. FRANK, *supra* note 1, at 87.

⁵ See, e.g., *In re Gault*, 387 U.S. 1 (1967); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶ See *Douglas v. California*, 372 U.S. 353 (1963).

⁷ See *Escobedo v. Illinois*, 378 U.S. 478, 487 (1964); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

⁸ *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).

⁹ *Id.*; see W. SEAGLE, *LAW: THE SCIENCE OF INEFFICIENCY* 102 (1952).

ise underlying the recent constitutional decisions in the area of criminal law is that the adversary process is the best available method to arrive at the truth and yet protect the rights of the individual.¹⁰

B. *The Finder of Fact*

In recent years there has been considerable modification of the traditional adversary process for adjudicating civil cases. Arbitration now resolves a large volume of disputes involving labor relations, contracts, and torts.¹¹ Specialized administrative tribunals have jurisdiction over a wide variety of problems.¹² Until the recent case of *In re Gault*,¹³ juvenile courts administered justice to juvenile offenders by an inquisitorial process devoid of the formality and constitutional limitations of the criminal trial process.

Perhaps the most significant difference between these methods of settling disputes and the traditional trial process is the absence of the jury. The right to trial by jury remains sacred in criminal trials,¹⁴ yet it is interesting to note how seldom that right is exercised.¹⁵ England, where individual rights are zealously protected,

¹⁰ See *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966); cf. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964). Several of the recent Supreme Court cases have applied constitutional rules traditionally associated with the criminal adversary process to noncriminal cases. E.g., *In re Gault*, 387 U.S. 1 (1967) (applied constitutional protections, particularly right to counsel, to juvenile court hearings); *Spevack v. Klein*, 385 U.S. 511 (1967) (applied privilege against self-incrimination to disbarment proceeding); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (applied privilege against self-incrimination to hold that person granted immunity in a State investigation cannot be incriminated by his testimony in subsequent federal proceeding). In these cases the Court seemed to recognize the possibility of criminal or quasi-criminal penalties and protected individual rights despite the noncriminal settings of the cases.

¹¹ Automobile insurers have begun to put arbitration clauses in their uninsured motorist provisions. The probable reason is that companies do not want disputes with their own customers to be fraught with the delay and the fighting atmosphere of an adversary trial.

¹² One obvious reason is that "Judges cannot furnish the skills in law, accounting, and engineering supplied by the staff of a relatively simple agency like the FCC, to say nothing of a more complex agency like the ICC . . ." K. DAVIS, *ADMINISTRATIVE LAW* § 1.05, at 16 (1959). Special skills of the finder of fact are another of the advantages of arbitration.

¹³ 387 U.S. 1 (1967).

¹⁴ J. FRANK, *supra* note 1, at 109 (1949).

¹⁵ One recent study indicates that of the major crime controversies that reach the stage of formal prosecution and are not dismissed three-fourths are disposed of without trial, and of those that do go to trial, 60 percent are tried before a jury. Thus, about one-seventh of all felony prosecutions end in jury trials. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 17-18 (1966).

has trial by jury only in "major crime" cases.¹⁶ The jury's sphere of influence is further reduced by the trend toward removal of certain types of offenses from the coverage of the criminal law.¹⁷

In civil cases, even where juries are used, the tendency has been to eliminate or weaken most of the exclusionary rules of evidence¹⁸ and to liberalize pretrial discovery in order to prevent surprise at trial.¹⁹ It seems anomalous that in criminal cases, where a person's liberty and the protection of society turn on a correct decision of fact and a proper application of law, these progressive reforms have not been utilized to any significant extent. The privilege against self-incrimination usually prevents the jury from hearing the accused's version of the facts. Cases like *Mapp v. Ohio*²⁰ and *Miranda v. Arizona*²¹ require the exclusion of evidence which, though possibly quite reliable, was illegally obtained. Finally, it is a nearly universal rule that pretrial discovery is not permitted in criminal cases.²²

There is supposed to be explicit faith in the reliability of the jury,²³ but the actions of many lawyers and judges reflect a deep-seated lack of faith in the mental capacity and rationality of jurors.²⁴ Trial lawyers who profess great faith in the jury spend years perfecting techniques for manipulating jurors by playing on their prejudices, passions, and ignorance.²⁵ Judges generally say that they

¹⁶ J. FRANK, *supra* note 1 at 109. Several American States limit the right to jury trial to major crimes. H. KALVEN & H. ZEISEL, *supra* note 15, at 16. For a discussion of the right to jury trial in foreign countries, see *id.* at 13 n.3.

¹⁷ According to one writer, in 1965 71 million of the 195 million people in the United States were not subject to criminal jurisdiction because they were under 18. Others such as the mentally ill, alcoholics, addicts, and psychopaths are being treated as victims of illness rather than as criminals. Kittrie, *The Divestment of Criminal Justice and the Coming of the Therapeutic State*, 1 SUFFOLK U.L. REV. 43, 43-44 (1967). Kittrie also points out that those incarcerated for treatment under the *parens patriae* theory now outnumber imprisoned criminals 4 to 1. *Id.* at 46.

¹⁸ For a brief discussion of the authorities supporting this trend, see K. DAVIS, *supra* note 12, § 14.02, at 248-49. Davis attributes the exclusionary rules to the use of the jury. *Id.* §§ 14.03-.04, at 249-51. The exclusionary rules may account for some of the acquittals in which the judge disagrees with the jury. H. KALVEN & H. ZEISEL, *supra* note 15, at 132-33.

¹⁹ See C. MCCORMICK, EVIDENCE § 100, at 203 (1954).

²⁰ 367 U.S. 643 (1961).

²¹ 384 U.S. 436 (1966).

²² See notes 31-44 *infra* & accompanying text.

²³ Cf. James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Trial*, 47 VA. L. REV. 218, 247-48 (1961).

²⁴ See *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 61-63 (2d Cir.), *cert. denied*, 355 U.S. 816 (1948), and the trial practice manuals cited therein; J. FRANK, *supra* note 1, at 82-87.

²⁵ See authorities cited note 24 *supra*.

agree with nearly all jury verdicts, and yet retain the power to direct verdicts because the jury might make a mistake.²⁶ There is also considerable reluctance to allow professional faith in the jury to be tested empirically.²⁷

The case of *Griffin v. California*²⁸ illustrates the strength of the unspoken belief that juries behave emotionally and irrationally and are not sufficiently intelligent and objective to correctly apply legal rules.²⁹ The *Griffin* decision forbids the prosecution from pointing out to the jury that the accused did not take the stand in his own defense, and at least tacitly advances the policy that it is better to keep the jurors ignorant and hope they will not notice the failure of the defendant to testify. This puts the supporters of the jury system in the strange position of relying on the jury's ignorance.

Consistency would require those who profess faith in the jury's ability to understand and apply the law to support the proposition that the defendant should have the right to an instruction on the meaning of the privilege and a judicial warning that no inference of guilt may be drawn from the defendant's failure to testify. This seems to be the position taken by the Supreme Court.³⁰

²⁶ See J. FRANK, *supra* note 1, at 180.

²⁷ H. KALVEN & H. ZEISEL, *supra* note 15, at vi-vii. The authors' research into jury behavior included the tape recording of actual jury deliberations, with the consent of the judge and counsel, but without the jurors' consent or knowledge. The project led to public censure by federal authorities and to the enactment of statutes against jury-tapping in 30 States.

²⁸ 380 U.S. 609 (1965).

²⁹ It should be noted that the rule in *Griffin* represents an attempt by the Court to make meaningful the constitutional right to refuse to testify and that the *Griffin* case cannot be read to indicate that, where no such constitutional right is involved, the Court lacks faith in the integrity and ability of the jury in the application of the law. This point is discussed by the Court in *Spencer v. Texas*, 385 U.S. 554 (1967). The Court distinguished that case, in which the defendant contended that the "fairness" of the trial was impaired because of the admission of evidence of his prior crimes, from *Jackson v. Denno*, 378 U.S. 368 (1964), which involved the protection of a specific constitutional right, the right to exclude involuntary confessions. 385 U.S. at 564-66.

³⁰ In *Bruno v. United States*, 308 U.S. 287, 292-94 (1936), the Court held that since there was a federal statute which provided that a defendant in a criminal case was a competent witness in his own defense and specifically stated that no presumption against him could be raised by his failure to testify, the defendant had a right to a charge explaining to the jury that his failure to testify should not raise any presumption against him in their deliberations. It is arguable that *Griffin v. California*, 380 U.S. 609 (1965), elevated this "no presumption" rule to constitutional status. It would seem that if a defendant has the right to the cautionary instruction where the right is statutory, a fortiori he must have the right when the "no presumption" rule is constitutional. But see *State v. Senzarino*, 224 N.E.2d 389, 396-98 (Ohio C.P. 1967), where an Ohio trial court overlooked this argument and denied the right to such an instruction by distinguishing *Bruno* on the ground that in that case there was a statu-

The legal realists should be content with a rule which would allow the defendant's attorney, by drawing upon his experience or upon empirical studies, the opportunity to choose whether the cautionary instruction should be given. It is submitted that this rule would be consistent with the idea that the trial is, or should be, a truth-determining process, and also would serve to make the *Griffin* principle meaningful.

C. *Pretrial Discovery or Surprise?*

The unavailability of discovery in criminal cases reflects and promotes the "fight theory" of trial. As Judge Frank put it: "[M]any prosecutors, infected badly by the fighting spirit, in partisan manner produce only the evidence they think will cause convictions."³¹ Suppression by the prosecutor of material evidence favorable to the defendant is violative of due process.³² This rule apparently does not require the prosecutor to disclose such evidence before trial, however.³³ The suppression strategy may assist the prosecutor bent on winning the game but obviously cripples the factfinding process.

Those who resist the liberalization of criminal discovery procedures argue that allowing discovery by the defendant would tip the balance of the scales too far toward the defendant,³⁴ encourage perjury and intimidation of witnesses,³⁵ and allow the defendant to discover the prosecution's case while at the same time permitting him

tory right to be free from the presumption, while in *Senzarino* there was no such State statute.

It may be doubtful which course of action, to request the charge or to remain silent on the issue, would best serve to prevent prejudice caused by the defendant's failure to testify. Cf. J. MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* 99 (1966), which discusses an empirical study which indicated that in tort cases insurance counsel would be well advised to avoid objecting and requesting a cautionary instruction when the matter of insurance was injected into the trial. Apparently it was better not to call attention to the matter.

³¹ J. FRANK, *supra* note 1, at 99; see Griswold, *The Long View*, 51 A.B.A.J. 1017, 1021 (1965).

³² *Brady v. Maryland*, 373 U.S. 73, 86-87 (1963).

³³ See Traynor, *supra* note 10, at 242-43. The California Supreme Court, before the Supreme Court decided *Brady v. Maryland*, 373 U.S. 73 (1963), had held that due process did not require pretrial discovery. *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). The *Brady* case seemingly did not change this rule.

³⁴ E.g., Traynor, *supra* note 10, at 249.

³⁵ E.g., *id.* at 228-29; Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732, 734 (1967). Justice Botein argues that discovery actually prepares the trial lawyer to discover and defend against such fraud. B. BOTEIN, *TRIAL JUDGE* 107 (1952).

to rely on the privilege against self-incrimination to protect himself from discovery.³⁶ None of these arguments is supported by the experience of Vermont, a State which has had liberal discovery for several years.³⁷

As a practical matter, the prosecution needs discovery much less than the defense. The prosecution nearly always enjoys a considerable advantage over the defense in resources and manpower and nearly always has the investigation well under way before the defendant has had a chance to even group his forces.³⁸ It would seem that the privilege against self-incrimination would limit the extent of discovery but probably not prohibit it altogether.³⁹

At present there is little discovery except for cases in which a prosecutor elects to open his files because his case is so strong that the probability of a guilty plea is high.⁴⁰ This has the effect of clearing up factual mysteries in the cases where such clarification is least needed, and leaving the close cases which most often go to jury trial⁴¹ to be decided by dramatic surprise evidence.⁴²

Justice Traynor forcefully stated the need for discovery:

³⁶ Traynor, *supra* note 10, at 228. In *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), the court held that the privilege limited discovery by the prosecution to the identity of witnesses and the existence of any reports which the defendant intends to use at trial.

³⁷ Langrock, *supra* note 35, at 734.

³⁸ Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 292-93; Traynor, *supra* note 10, at 229. Mr. Justice Brennan has pointed out that most criminal defendants are indigent and that assigned counsel need discovery so that they, as well as the State, can benefit from the investigative work done while the trail was fresh. Brennan, *supra* at 285-87.

³⁹ Mr. Justice Brennan has argued that the privilege does not in fact bar the prosecution from discovery of the defendant because of the State's advantages in investigative resources. Brennan, *supra* note 38, at 292-93. The State, in effect, benefits from informal discovery before the case is under the control of the court. The opportunity of the prosecution to discover facts about the accused by interrogation has been greatly reduced since Mr. Justice Brennan's article. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964). A California case has already upheld limited pretrial discovery by the prosecution. *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

⁴⁰ This type of discovery preceded Vermont's adoption of a discovery statute. Langrock, *supra* note 35, at 732-34. The voluntary process is basically the procedure employed in the federal system. Traynor, *supra* note 10, at 237. Justice Traynor objects to the voluntary procedure because "pretrial discovery can operate effectively only if it is impartially administered in accord with objective standards free of adversary considerations of trial strategy." *Id.* at 237-38.

⁴¹ H. KALVEN & H. ZEISEL, *supra* note 15, at 31. The number of jury trials depends on several factors, but the basic factor seems to be the closeness of the case, or, stated another way, the unpredictability of the jury's decision.

⁴² Much of the suspense and drama of a trial is missing where there is no jury. L. GREEN, *JUDGE AND JURY* 403-04 (1930).

Discovery is a bad word to devotees of the old-time theater of hide-and-go-seek. It is time to ask whether the element of surprise they set such store by is not one of the most overrated elements in the judicial process. It is one thing to acknowledge its usefulness in testing credibility, but quite another to glorify it as the keystone of the adversary system. If it were indeed the keystone, the arch would in truth be fallen. The truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise.⁴³

If the goal of the trial process is really the truth, it is time for the extensive liberalization of discovery procedures. The trend is in the right direction.⁴⁴

D. *The Facts Found by the Jury*

According to Justice Botein, "No judge or any other critic knows what facts a jury finds from the evidence."⁴⁵ This is odd because in theory the jury finds the facts and then applies the law as given to them by the judge.⁴⁶ If that theory were actually practiced, the jury would have to submit answers to specific factual issues.⁴⁷

The general verdict is the standard in criminal cases, however, and the special verdict is disfavored.⁴⁸ The general verdict enhances the probability that jurors will respond to appeals to their

⁴³ Traynor, *supra* note 10, at 249.

⁴⁴ Ohio law now provides that either the prosecution or the defense may apply to the court for permission to take a deposition from any witness. OHIO REV. CODE ANN. § 2945.50 (Page Supp. 1966). For a discussion, see Comment, *The New Criminal Deposition Statute in Ohio — Help or Hindrance to Justice?*, 19 CASE W. RES. L. REV. 279 (1968). Vermont limits discovery to the defendant but, unlike Ohio, allows the defendant to get a court order compelling the prosecution to allow him to inspect and copy documents, statements, and other evidence taken from him, as well as allowing him to take depositions. VT. STAT. ANN. tit. 13, §§ 6721-27 (Supp. 1967). California is probably the leader in the area of expanding discovery. That State now allows the defendant to discover most of the products of the prosecutor's investigation, including names and addresses of witnesses, and also permits limited discovery by the prosecution. California's development has been largely by judicial decision. See Traynor, *supra* note 10, at 243-49 and the cases cited therein. For a discussion of the English discovery practice, see Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749 (1964).

⁴⁵ B. BOTEIN, *supra* note 35, at 107.

⁴⁶ J. FRANK, *LAW AND THE MODERN MIND* 170 (1930).

⁴⁷ *Id.*

⁴⁸ 8 J. MOORE, *FEDERAL PRACTICE* § 31.02[3] (2d ed. 1953). Special verdicts are used where it is necessary to separate decisions on two issues. *United States v. Ogull*, 149 F. Supp. 272 (S.D.N.Y. 1957) (special finding required to determine correct penalty in case of guilt). Reluctance to use the procedure may be explained by the fact that it is technically difficult to apply. *Id.* at 278.

passions and prejudices.⁴⁹ Despite this likelihood, it is argued that the jury mitigates the severity of the law and that forcing the jury to adhere to its theoretical function would require the application of many bad rules of law and would result in less equitable decisions.⁵⁰ The jury is thus considered to be a necessary and convenient means of legal reform. Professor James, for example, feels that the general verdict is to be preferred to the special verdict wherever the law is changing or out of tune with "popular notions of justice."⁵¹ He would presumably favor general verdicts in criminal cases.

Although recent research on the behavior of juries does indicate that juries are usually more lenient than judges,⁵² it seems quite probable that in many cases juries do convict where judges would have acquitted,⁵³ and that in many of these cases, jurors would not have agreed to the necessary findings of fact had special interrogatories been submitted to them. Thus, it is not necessarily true that the general verdict operates in favor of the defendant.⁵⁴

It is submitted that until there is considerable reform in the criminal law, especially the abolition of capital punishment, the jury will probably be necessary as a means of injecting equity into the criminal trial process. Much detailed research into the mechanics of jury decisionmaking is urgently needed; accordingly, the legal profession and the legislatures should welcome and encourage such research rather than resisting and restricting it as has been done in the past.⁵⁵ If the empirical studies do indicate that jury performance is inadequate, the special verdict could be a good compromise.

E. *The Bifurcated Trial*

Where constitutional rights are involved, the Supreme Court has not shown complete faith in the jury's ability to decide cases involving complex issues.⁵⁶ In *Jackson v. Denno*,⁵⁷ the Court re-

⁴⁹ See *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 61-63 (2d Cir.), *cert. denied*, 355 U.S. 816 (1948).

⁵⁰ See James, *supra* note 23, at 247-48.

⁵¹ *Id.* at 248.

⁵² H. KALVEN & H. ZEISEL, *supra* note 15, at 68.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See generally note 27 *supra*.

⁵⁶ See, e.g., *Griffin v. California*, 380 U.S. 609 (1964); *Jackson v. Denno*, 378 U.S. 368 (1964).

⁵⁷ 378 U.S. 368 (1964).

quired that a trial judge decide that a confession was voluntary before submitting the confession and the issue of its voluntariness to the jury.⁵⁸ The Court feared that the jury might have considered the truth or falsity of the confession in determining the issue of voluntariness.⁵⁹ Naturally the general verdict did not reveal how the jury had treated the confession, and therefore the Court reversed the conviction and remanded the case to the State court for an independent factual determination of the voluntariness issue.⁶⁰ The case illustrates a possible means of reducing the number of collateral issues which a jury must consider, and of thereby preventing confusion of those issues with the central issues of the case.

A bifurcation of trial might be desirable in the case of an insanity plea. The issue of mental competence at the time of trial is usually tried separately⁶¹ but the issue of sanity at the time of the purported crime is usually tried contemporaneously with the guilt issue because such insanity excuses one from criminal responsibility.⁶² It would seem that there should be a factual determination by the jury that the defendant did or did not commit the act complained of and that the issue of insanity should be considered separately.⁶³

II. DISFUNCTIONAL RULES OF CONSTITUTIONAL DIMENSION

A. "On Hard and Soft Centres"⁶⁴

Theories of the relationship of the Bill of Rights to the due process clause of the 14th amendment vary considerably in emphasis and approach. Some of the justices have stressed the need for fixed rules to make the law certain and predictable while others, emphasizing the need for experiment, have preferred individualized

⁵⁸ *Id.* at 395.

⁵⁹ *See id.* at 376-77.

⁶⁰ *Jackson*, of course, leaves open the possibility that the judge will find a confession voluntary and submit it to the jury and that they will then find it involuntary and refuse to consider it on the issue of guilt, although they will have difficulty resisting its influence. This seems to be another area where it is thought better to err on the side of leniency rather than to risk convicting an innocent person. The individual in reality is protected from prejudice by the confession only if the evidence of involuntariness is sufficient to convince the judge to refuse to submit the confession to the jury.

⁶¹ *See, e.g.*, CAL. PEN. CODE § 1368 (West 1956); OHIO REV. CODE ANN. § 2945.37 (Page 1954).

⁶² For a discussion of this problem see text accompanying notes 196-224 *infra*.

⁶³ *See* text accompanying notes 208-14 *infra*.

⁶⁴ A. COMFORT, *DARWIN AND THE NAKED LADY* (1962).

justice. The interpretation currently favored has characteristics that could be disfunctional if carried too far. The Constitution may be construed to prohibit experiments necessary to determine whether there is an alternative to the adversary trial. The fifth amendment privilege against self-incrimination may be used for illustration. In *Twining v. New Jersey*,⁶⁵ the Supreme Court rejected the contention that a trial could not be "fair" if the privilege against self-incrimination were not afforded.

Even if the historical meaning of due process of law and decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government.⁶⁶

The privilege was not thought to be "of the very essence of a scheme of ordered liberty,"⁶⁷ and to do without it would not "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"⁶⁸ This "fundamental fairness" doctrine was eventually supplanted by the "incorporation doctrine."⁶⁹ The complete incorporation theorists deem "fundamental" those rights enumerated in the first eight amendments to the Constitution. The process of absorption carries the enumerated right over to the state proceedings unattenuated in form or substance.⁷⁰ Although the incorporation doctrine has only been applied selectively,⁷¹ the *Twining* case has been overruled by *Malloy v. Hogan*⁷² and the privilege against self-incrimination is now applied to the States. The requirement that the fundamental right be applied congruently in State and federal courts seriously inhibits

⁶⁵ 211 U.S. 78 (1908).

⁶⁶ *Id.* at 113.

⁶⁷ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁶⁸ *Id.* at 328.

⁶⁹ With the *Mapp* decision, the incorporation doctrine visibly became a substitute. Arguments for incorporation theory had long been made, futilely, in dissenting opinions. See *Cohen v. Hurley*, 366 U.S. 117, 131, 150, 151 (1961) (dissenting opinions by Justices Black, Douglas, and Brennan respectively); *Adamson v. California*, 332 U.S. 46, 68, 123 (1947) (dissenting opinions by Justices Black and Murphy respectively); *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (dissenting opinion by Justice Harlan); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (dissenting opinion by Justice Harlan). See also Note, *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268 (1949).

⁷⁰ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁷¹ See *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment right of confrontation); *Gideon v. Wainwright*, 367 U.S. 643 (1961) (sixth amendment right to counsel). See generally, Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

⁷² 378 U.S. 1 (1964).

experimentation necessary to determine whether an alternative to the adversary process would render results more cognizant of basic notions of fairness, justice, and individual liberty. For example, the manner in which the Court has delineated the fifth amendment privilege leaves little, if any, room for polygraph experiment. Obviously to subject the accused to a lie detector test would violate the amendment as it is presently construed.⁷³ Even requiring witnesses or jurors to submit to lie detector tests or psychological fitness tests would present problems of constitutional dimension.⁷⁴ Still more apparent is the uncompromising attitude the Court can be expected to take toward narcoanalysis which not only neutralizes the conscious free will but also penetrates the subconscious.⁷⁵ The penumbral rights theory contributes significantly to the fortress of legal protection surrounding the accused.⁷⁶ The "zone of privacy" emanating from the penumbra of the first, third, fifth, and ninth amendments secures those specific guarantees against intrusion.⁷⁷ The effect of the penumbral rights doctrine is to lessen the opportunity to experiment in criminal trials.

⁷³ Because a lie detector test measures physiological responses to questions, and not the answers themselves, one route to admissibility may be open. In *Schmerber v. California*, 384 U.S. 757 (1966), the Court upheld the admission of a blood test taken from an accused while in custody and over his objection. The Court distinguished between "testimonial" and "physical" evidence in disposing of the fifth amendment claim. See *Breithaupt v. Abram*, 352 U.S. 432 (1957) (blood samples); cf. *Irvine v. California*, 347 U.S. 128 (1954) (wiretap). Since the oral response in a polygraph examination is usually controlled (the subject is required to answer every question in the negative), it is clear from a physiological viewpoint that the evidence is physical. The argument that but for the compulsion to answer, even though in the negative, no evidence would be elicited, is a tenuous one. The controlled response functionally serves to eliminate a variable that could otherwise distort the recorded data. The subject's participation in self-accusation is, practically, no more significant than the participation attributed to him in the blood sample cases because his blood flows. Beyond the fact that different anatomical machinations produce the controlled effect, there is no legally significant physiological distinction. The only meaningful difference from a legal standpoint is that the stimulus that evokes the controlled response in the lie detector case comes from without — the examiner's instruction — and inhibits a present exercise of free will, while in the blood test case (even assuming that the stimulus comes from without) the infringement of free will has never been at issue — blood flows (assuming life, and the desire to live) regardless of free will. If a polygraph examination were mandatory for every accused, it is likely that the combination of oral response (even though not measured) and the presence of nonvolitional aspects would lead the Court to find a fifth amendment violation.

⁷⁴ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); cf. *People v. DeLucia*, 282 N.Y.S.2d 526 (1967).

⁷⁵ "It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum.'" *Townsend v. Sain*, 372 U.S. 293, 307-08 (1963).

⁷⁶ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁷ *Id.*

Further consideration of the present trends in constitutional interpretation does reveal some open paths to experiment short of constitutional amendment. The incorporation doctrine is not entirely homogeneous. Specifically, although Mr. Justice Black, a complete incorporationist, maintains that the first eight amendments are the final and complete expression of what is fundamental,⁷⁸ Mr. Justice Douglas does not agree.⁷⁹ Chief Justice Warren and Mr. Justice Brennan joined in the concurring opinion of Mr. Justice Goldberg in *Griswold v. Connecticut*,⁸⁰ where Mr. Justice Goldberg expressed the view that the ninth amendment is manifest recognition that certain "fundamental rights exist that are not expressly enumerated in the first eight amendments . . ."⁸¹ Of course, the whole Court has never been in agreement that the incorporation doctrine is proper at all.⁸² How receptive to a new truth-seeking process the Supreme Court would be if, for instance, a lie detector were used, is not perfectly clear. The Court ought not to prevent this meritorious progress by maintaining the present level of esteem for the privilege against self-incrimination unless there is some justification for the privilege other than mere fidelity to the incorporation principle. This argument would be more persuasive if it could be shown that a new trial process could be based upon a higher degree of respect for human dignity than the present trial process. It would then be conceivable that the Court would hold that the privilege against self-incrimination is only applicable to adversary proceedings, and that inquiries that do not "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'"⁸³ are constitutional.

*B. The Rule That "It is Hard for a Man to be Bound to Criminate Himself"*⁸⁴

The question whether the fifth amendment privilege must have constitutional magnitude merits consideration. The privilege against self-incrimination has a "mystical and emotional atmos-

⁷⁸ See *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion). But cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁷⁹ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁰ 381 U.S. 479, 486 (1965).

⁸¹ *Id.* at 492.

⁸² See Frankfurter, *supra* note 71.

⁸³ *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

⁸⁴ EXTRACTS FROM BENTHAM 304 (1844).

phere" that the late Professor McCormick attributed in part to its origin in the medieval church.⁸⁵ But the common popularity of the privilege today is probably due, in large part, to the loyalty oath cases,⁸⁶ and the House Committee on Un-American Activities hearings⁸⁷ after the Second World War. Without a doubt, it is a rule of noble history and deserves veneration.⁸⁸ A place in the common law of England was made for the privilege in the famous trial of John Lilburn.⁸⁹ Lilburn was charged in Star Chamber with sedition, and, although he was "whipped and pilloried" for his refusal to take an oath and answer questions on matters not directed to the charge against him, he later succeeded in having the conviction set aside and in establishing the rule against self-incrimination.⁹⁰

Most of the States were early in adopting constitutional protection against self-incrimination, because the English and pre-Revolution experience was fresh in mind.⁹¹ Yet, surprisingly perhaps, the fifth amendment was not incorporated into the due process clause of the 14th amendment until the 1964 case of *Malloy v. Hogan*.⁹² The attitude of the Supreme Court, prior to the *Malloy* decision, was best expressed by Justice Cardozo:

What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination

⁸⁵ C. MCCORMICK, EVIDENCE § 120, at 252 (1954).

⁸⁶ E.g., *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960); *Lerner v. Casey*, 357 U.S. 468 (1958); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958); *Slochower v. Board of Educ.*, 350 U.S. 551 (1956). See also Byse, *Teachers and the Fifth Amendment*, 102 U. PA. L. REV. 871 (1954); Horowitz, *Loyalty Tests for Employment in the Motion Picture Industry*, 6 STAN. L. REV. 438 (1954).

⁸⁷ See Fortas, *Methods of Committees Investigating Subversion — A Critique*, 29 NOTRE DAME LAW. 192 (1954); Newman, *The Supreme Court, Congressional Investigations, and Influence Peddling*, 33 N.Y.U.L. REV. 796 (1958); Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181 (1948).

⁸⁸ For a discussion of the history of the rule, see 8 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1966) and authorities cited therein.

⁸⁹ C. MCCORMICK, *supra* note 85, at 254.

⁹⁰ *Id.*

⁹¹ *Id.* at 256.

⁹² 378 U.S. 1 (1964). Significantly, even as late as 1961, the Supreme Court had held that the privilege against self-incrimination was not a fundamental right. *Cohen v. Hurley*, 366 U.S. 117 (1961). The first amendment freedoms, in contrast to the privilege, had all been carried over to the States before the incorporation doctrine was accepted by a majority of the Court. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (separation of church and state); *Cantwell v. Connecticut*, 310 U.S. 296 (1949) (freedom of religion); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech).

This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.⁹³

The change in judicial attitude since *Malloy* is best exhibited by Justice Goldberg's statement of the policies of the privilege:

The privilege against self-incrimination "registers an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.'" It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial . . . system of criminal justice; our fear that self-incrimination statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the . . . government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and . . . our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."⁹⁴

Happily, the late Professor Wigmore's great work treats each of the policy considerations stated in the Court's opinion.⁹⁵ Noteworthy is Professor Wigmore's comment, after reviewing the rationale and policies behind the rule, that the privilege is used for many reasons, few of which can be related to any legitimate purpose.⁹⁶

Some of the justifications for the rule announced in Justice Goldberg's opinion can be treated without difficulty. The assertion that the privilege hallmarks an "important advance in the development of our liberty" and a "landmark" in man's purposeful drive toward self-civilization does not state a reason for the rule.⁹⁷ It merely tells about the significance of the rule. The statement describing the nature of the legal system is similarly irrelevant.⁹⁸ The "cruel trilemma" of the disclosure of harmful facts, contempt, or perjury exists in every situation where there is compulsory testi-

⁹³ *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

⁹⁴ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (footnotes omitted).

⁹⁵ 8 J. WIGMORE, *supra* note 88, at 310-18.

⁹⁶ *Id.* at 318.

⁹⁷ *Id.* at 312. This justification was first advanced in E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955) (paralleling the disuse of torture).

⁹⁸ J. WIGMORE, *supra* note 88, at 312.

mony regardless of whether the witness is the defendant in a criminal trial.⁹⁹ Of course, the trilemma appears to be most "cruel" in a criminal trial in which the accused must testify.¹⁰⁰

Fear of "inhumane treatment and abuses" is certainly a legitimate concern. Dean Wigmore divided the subject into two categories: torture and "browbeating or bullying," the latter of which he conceded may provide "a partial justification" for the privilege against self-incrimination, at least when the obnoxious treatment takes place before a grand jury, legislative committee, or a magistrate, where the examiner has wide latitude to ask questions which strain the requirement of relevance.¹⁰¹ Although Dean Wigmore dismissed torture as outdated, cases involving physical torture have occurred too recently in the past to warrant such an assumption.¹⁰² Further, browbeating and bullying, if not torture in fact, may approach it.¹⁰³ The modern trial, however, is an adequate means to protect against such abuses. Pretrial custody cases where judicial supervision is lacking are the real bases for the Court's fear.¹⁰⁴

The reason for the requirement that the government carry the entire burden "in its contest with the individual" is based primarily on the concepts of sportsmanship and fair play.¹⁰⁵ It is implicitly assumed that the criminal defendant is somewhat analogous to the fox in a fox hunt.¹⁰⁶ The privilege against self-incrimination compensates for the superior forces of the prosecution and tends to

⁹⁹ *Id.* at 316.

¹⁰⁰ *Id.* Is there ever such a "cruel trilemma"? The alternative of disclosure presents an anomaly. Voluntary disclosure is supposed to bring relief from the anxiety of guilt feelings; yet compelled disclosure is thought to be "cruel." *Id.* Assuming that the accused suffers anxiety that would be relieved through disclosure (whether voluntary or not), the "cruel" characterization would only apply to the fact that a human being would be required to act in contravention of the instinct of self-preservation. But society does not fret over subjecting an accused to the jeopardy of trial or sentence even though an absolute bar on prosecutions or conviction would be, in this context, decidedly more humane and less difficult for the accused. The vexing nature of disclosure could be alleviated more practically by reducing the hazards to self-preservation — such as legislating humane penal and punishment reform. It does appear that to term the trilemma "cruel" is something of an overstatement. The other alternatives in the trilemma, perjury and contempt, assume, respectively, a devout witness in every case. These assumptions are not altogether probable. *Id.*

¹⁰¹ *Id.* at 315-16.

¹⁰² See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁰³ See, e.g., *Lynum v. Illinois*, 372 U.S. 528 (1963); *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Reck v. Pate*, 367 U.S. 433 (1961); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Malinski v. New York*, 324 U.S. 401 (1945). See also *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁰⁴ See cases cited note 103 *supra*.

¹⁰⁵ 8 J. WIGMORE, *supra* note 88, at 317.

¹⁰⁶ EXTRACTS FROM BENTHAM, *supra* note 84, at 310.

equalize the parties to the contest; the criminal defendant, just as the fox, must have a fair chance to escape. The modern trial, however, is not, and should not be a game, and sportsmanship is a poor justification for the rule. It is arguable that today the privilege has been so far extended that it overcompensates for the inequality of the parties and in so doing, prevents the determination of the truth and thus undermines the very purpose of a trial.

Professor McCormick's indictment of the privilege has considerable merit:

The privilege is an institution which is built on sentimental association, rather than on its value in protecting substantial human interests

The privilege operates principally in aid of the guilty: the innocent have no need of it¹⁰⁷

It runs counter to common-sense practices of investigation in the ordinary affairs of life. . . . [T]he felt need for access to this primary source of information . . . places a strain upon the courts in administering the privilege.¹⁰⁸

Similarly, Justice Cardozo's observation, that "[j]ustice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry,"¹⁰⁹ appears to be quite sound.¹¹⁰

Because the privilege contributes little if anything to the effort to find truth,¹¹¹ it must ameliorate some deficiency in the trial process if it is to earn its way. No attempt is made here to deny the importance of immunity from self-incrimination during pretrial stages. Procedural safeguards perform invaluable functions in minimizing the chance that an innocent person will be subjected to an unfounded accusation of crime. It is the pretrial period — arrest to trial — that is *most* "critical" in regard to the preservation of human dignity. But at trial, in open court, it is difficult to find any compelling reason to tolerate the multiple burdens caused by the exercise of the privilege.

¹⁰⁷ But see 8 J. WIGMORE, *supra* note 88, at 310 (protects the accused who would perform badly as a witness).

¹⁰⁸ C. MCCORMICK, *supra* note 85, at 290.

¹⁰⁹ *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

¹¹⁰ Traynor, *Devils of Due Process*, 23 U. CHI. L. REV. 657, 679 (1966).

¹¹¹ The argument that the privilege protects the innocent but nervous defendant (see note 107 *supra*) has been challenged. Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 690 (1951). Perhaps a statement from the trial judge, after evaluating the accused's condition, informing the jury that the defendant's anxiety on the stand appears to him to be the product of a natural inclination and not the trauma of evasion and lying, would, in light of the jury's recognition of the judge's experience in seeing many witnesses, protect the accused from harmful inferences.

C. *The McNabb-Mallory Rule — A Wider Gulf Between the Search and the Truth?*

Prior to the decisions in *Miranda v. Arizona*¹¹² and *Escobedo v. Illinois*,¹¹³ the Supreme Court established rules applicable in federal courts regarding unlawful detention. In *McNabb v. United States*,¹¹⁴ the Court held that confessions secured by police during a period of detention and interrogation prior to arraignment could not be admitted into evidence at trial under the circumstances of the case. It appeared that at least two of the McNabb brothers were detained for more than 2 days. The purpose of the police detention was to interrogate the McNabb brothers, operators of an illegal still, about the murder of a federal agent who was investigating the family's activities. While there was some evidence of coercive practices by the police,¹¹⁵ the Court did not reach the question of a violation of the due process clause of the 14th amendment.¹¹⁶ Rather, the Court rested its decision on "the duty of establishing and maintaining civilized standards of procedure and evidence."¹¹⁷ Thus, the exclusionary rule regarding confessions and inculpatory statements made during a period of unnecessary delay in presenting the accused before a magistrate for arraignment is not of constitutional origin, but is a rule derived from the Supreme Court's supervisory power over the federal court system¹¹⁸ and is therefore not applicable to State court proceedings through the 14th amendment. The *McNabb* decision was aimed at curbing the coercive police practice of subjecting the accused to interrogation and incommunicado detention before first obtaining the sanction of an impartial magistrate.¹¹⁹

In *Mallory v. United States*,¹²⁰ the Court made it clear that "unnecessary delay" in arraignment is alone enough to nullify a confession obtained during the period of such delay.¹²¹ Significantly,

¹¹² 384 U.S. 436 (1966).

¹¹³ 378 U.S. 478 (1964).

¹¹⁴ 318 U.S. 332 (1943).

¹¹⁵ *Id.* at 344-45.

¹¹⁶ *Id.* at 340. But see *United States v. Mitchell*, 322 U.S. 65, 67 (1944) (reference to psychological coercive features of *McNabb* as "decisive").

¹¹⁷ 318 U.S. at 340.

¹¹⁸ See 8 J. MOORE, *FEDERAL PRACTICE* ¶ 5.02 (2d ed. 1966).

¹¹⁹ *United States v. Mitchell*, 322 U.S. 65 (1944) (eight-day delay before arraignment did not vitiate confession obtained within brief period after arrest).

¹²⁰ 354 U.S. 449 (1957).

¹²¹ *Accord*, *Upshaw v. United States*, 335 U.S. 410 (1948).

there was no evidence of coercive practices in *Mallory* and the confession was not one which traditionally would be thought of as coerced.¹²²

It is quite apparent that the federal exclusionary rule was intended to protect a suspect from coercion by curbing police practices geared toward the procurement of confessions. The warnings now required to be given by *Miranda* appear adequate to perform the same function. While *Miranda* is directed at the same goals and motivated by the same notions of fairness,¹²³ it is based on the privilege against self-incrimination and is, therefore, a constitutional requirement.¹²⁴

As a practical matter, the *Miranda* warnings severely limit the scope of the investigation that may be brought to bear upon the accused. They do not, however, impose a limitation upon the permissible *length of detention*, and do not inhibit investigation which does not involve interrogation of the accused.¹²⁵ While *Miranda* can be expected to reduce the period of detention in practice, it does not impose a limitation as a matter of law.¹²⁶

The significance of the *Miranda* decision is greater than simply its extension of the fifth amendment privilege to an earlier stage of the accusatorial process — thereby giving effect to the privilege “at the only stage when legal aid and advice would help.”¹²⁷ *Miranda* also insists that a confession be disregarded if warnings were not given, regardless of the reliability of the confession or its probative value. In other words, it makes no difference that the confession was given voluntarily in fact and represents a truthful account of events that transpired.¹²⁸

The emergence of a new constitutional basis for exclusion became apparent with *Mapp v. Ohio*.¹²⁹ In *Mapp*, the Supreme Court

¹²² But see *Miranda v. Arizona*, 384 U.S. 436 (1966) (incommunicado detention may be inherently coercive).

¹²³ *Id.* at 463.

¹²⁴ It would be superfluous, in light of all that has been written about *Miranda*, to give that case extensive treatment here. It is sufficient to note that although the privilege was once thought to vest only after arraignment, *Miranda* holds that it vests at the moment the suspect is in custody “or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444. The Court has simply reevaluated the events in the arrest-to-trial process and has determined that the adversary character of earlier steps requires protection. *Id.* at 469.

¹²⁵ *Id.* at 477-78.

¹²⁶ *Id.* at 463 n.32.

¹²⁷ *Spano v. New York*, 360 U.S. 315, 326 (1959) (Douglas, J., concurring), quoted in *Escobedo v. Illinois*, 378 U.S. 478, 484-85 (1964).

¹²⁸ *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

¹²⁹ 367 U.S. 643 (1961).

overruled *Wolf v. Colorado*.¹³⁰ *Wolf* had held that the rule of *Weeks v. United States*¹³¹ — which required the suppression of evidence obtained through an illegal search and seizure — was based on federal supervisory power, not on the Constitution.¹³² At the time that *Wolf* was decided, the prevailing fundamental fairness test provided a basis for exclusionary rules to combat only those practices of the police which undermined the truth-determining process.¹³³ Thus, when *Wolf* was decided, rules of exclusion were viewed as essentially evidentiary rules founded on libertarian principles with no constitutional attachment. Exclusion was not based on offensive police practices alone unless they were "shocking."¹³⁴ In *Mapp*, however, the Court held that the unreasonable seizure of lewd and lascivious books and pictures violated the fourth amendment, that the fourth amendment was incorporated into the 14th amendment, and that the matter seized could not be introduced as evidence despite its probative value and reliability.¹³⁵ The unreasonable search — an offensive police practice held to be prohibited by the Constitution — was alone the basis for the rule of exclusion.¹³⁶

Mr. Justice Harlan, dissenting in *Mapp*, observed that *McNabb* violations by State police had not moved the Court to exclude evidence, even though it was unlawfully obtained.¹³⁷ It will be recalled that *Mapp* was the first decision of the Supreme Court to enforce a rule of exclusion even though the evidence had probative value and was not coerced. It would now seem inconsistent, in light of *Mapp*, for the Court to adhere to their holdings in *McNabb* and *Mallory* in a situation involving a *McNabb* violation by State police officers. In light of the Court's explicit statement in *Miranda* of the continuing vitality of the *McNabb-Mallory* rule,¹³⁸ it is conceivable that the Court will apply the *McNabb-Mallory* rule to the

¹³⁰ 338 U.S. 25 (1949).

¹³¹ 232 U.S. 383 (1914).

¹³² See text accompanying note 118 *supra*.

¹³³ 338 U.S. 25 (1949); cf. *Adamson v. California*, 332 U.S. 46 (1947) (overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964)).

¹³⁴ See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952).

¹³⁵ Actually, the seed of *Mapp* was sown in *Rogers v. Richmond*, 365 U.S. 534 (1961) where the Court, speaking through Mr. Justice Frankfurter, held that the truthfulness or reliability of a confession is not an element to be considered in determining voluntariness. *Id.* at 541.

¹³⁶ 367 U.S. at 657; accord, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); cf. *Griffin v. California*, 380 U.S. 609 (1965).

¹³⁷ 367 U.S. at 683-84.

¹³⁸ 384 U.S. at 463 n.32.

States. Yet, since *Miranda* already affords considerable protection for the accused who makes statements while in custody, the only conceivable function of the *McNabb-Mallory* rule would be to prohibit the admission of any statements made by the accused even though given voluntarily and even though the accused effectively waived his constitutional rights.¹³⁹

An application of the *McNabb-Mallory* rule to the States would not be as analytically sound as it may appear. It would be valid only if given the underlying premise of the fight theory of criminal adjudication which frankly recognizes the awe-provoking power of the State and the need to give the defendant a sporting chance in the ensuing battle. But further analysis reveals that there is a significant difference between the rule in *Mapp* which excludes evidence obtained *because* of the constitutional violation and the *McNabb-Mallory* rule which excludes evidence in *the absence* of a relationship between the prohibited act and the inculpatory evidence. To the extent that the *McNabb-Mallory* rule is addressed to a fear of police coercion, it is properly a rule of constitutional dimension; but *Miranda* has already been read to perform that function.¹⁴⁰ To give the *McNabb-Mallory* rule constitutional force would be to admit with finality that the adversary process is not a method for seeking truth, but is a means of equalizing combatants to ensure a good fight.¹⁴¹

Thus, the *McNabb-Mallory* rule has been undermined by *Miranda*. Its applicability in the federal courts under the supervisory power is no longer justifiable. The only possible rationale for the rule of exclusion is that it will curb unwarranted delays in taking the accused before a magistrate. In light of the availability of civil and criminal remedies to effect compliance with the "without unreasonable delay" requirement, it is obvious that to use an exclusionary rule instead would be dysfunctional. Society in general suffers as the crime rate climbs; the courts will face more delay because every defendant will be advised to move for suppression of the unrelated evidence if there is any chance of success; the prose-

¹³⁹ Of course a *McNabb-Mallory* violation may be construed as an invasion of privacy. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). However, it is difficult to see the rationale for imposing an exclusionary rule on this basis.

¹⁴⁰ *Davis v. North Carolina*, 384 U.S. 737, 741 (1966).

¹⁴¹ See 8 J. WIGMORE, EVIDENCE § 2252, at 318 (McNaughton rev. 1961). Some commentators nevertheless urge a 14th amendment absorption of the *McNabb-Mallory* rule. See, e.g., Broeder, *Wong Sun v. United States: A Study in Faith & Hope*, 42 N.B. L. REV. 483, 567 (1963); Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel and Prompt Arraignment*, 27 BROOKLYN L. REV. 24, 34-39 (1960).

cution will be faced with the frustrating task of representing the public under laws made without regard to the interests of the public; and everyone prepared for trial will experience the anxiety of waiting for someone to sweep away the mud and the fog, clear the issues, clear the courtroom, and make way for others to play the game.

D. *Spillover and Constitutional Diseconomies*

Because the Supreme Court has interpreted certain of the Bill of Rights as a delineation of fundamental rights and has exalted some rights over others,¹⁴² there is disparagement of nonfundamental rights in the first eight amendments¹⁴³ and substantial abridgement of some fundamental rights.¹⁴⁴ An obvious example of spillover underlies the free press-fair trial controversy. The preferential treatment accorded the first amendment right of free press intrudes upon the accused's right to a fair trial by an impartial jury.¹⁴⁵

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."¹⁴⁶ The difference between theory and practice was considered by the Supreme Court in *Sheppard v. Maxwell*.¹⁴⁷ In the *Sheppard* case, a great deluge of inflammatory publicity preceded and accompanied the trial. The extrajudicial influences on the jury were enormous. No change of venue was granted in *Sheppard* and, although the jurors were admonished by the trial judge not to read newspapers, watch television, or listen to the radio, they were not sequestered.¹⁴⁸ The Court held that the probability of prejudice was sufficient, in light of the "totality of the circum-

¹⁴² *E.g.*, the first amendment freedom of the press subjugates sixth amendment rights.

¹⁴³ The second, third, and seventh amendments have not been deemed fundamental.

¹⁴⁴ The eighth amendment proscription of cruel and unusual punishment is an example of a constitutional right that has not been accorded the expansive judicial development for which it is suited. Although it is now apparently regarded as fundamental, *Robinson v. California*, 370 U.S. 660 (1962), it is not a procedural safeguard and therefore cannot be easily applied in a definitive manner.

¹⁴⁵ The first amendment rights have been called "preferred" by the Court. *Thomas v. Collins*, 323 U.S. 516, 530 (1945); see *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). But see *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring).

¹⁴⁶ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.).

¹⁴⁷ 384 U.S. 333 (1966).

¹⁴⁸ *Id.* at 352-53.

stances," to require reversal for a new trial.¹⁴⁹ The Court recognized the need for reform to protect the accused's right to a fair trial — "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."¹⁵⁰ Yet, the only preventative measures suggested by the Court were aimed at keeping the press from news, and the jury from the press.¹⁵¹ Once the news media picks up trial information, no remedy is available to prevent dissemination of news that is likely to prejudice the defendant if a juror reads it.¹⁵² It has been said that the right to a fair trial is the "most fundamental of all freedoms,"¹⁵³ but even if this statement can be accepted literally, a free press is an indispensable requisite to a fair public trial.¹⁵⁴ The irony is clear: the accused cannot be assured of a fair trial if the press is not present, and if the press is present, the possibility of prejudicial publicity looms. In order to fully appreciate the fair trial-free press problem it is necessary to understand that a fair trial is considerably more than a public trial. It is a speedy trial¹⁵⁵ by impartial jurors¹⁵⁶ in which the defendant has the benefit of counsel,¹⁵⁷ compulsory process,¹⁵⁸ confrontation of adverse witnesses,¹⁵⁹ and knowledge of the charges against him.¹⁶⁰ These factors are meant to secure calm, solemn, and deliberative trials. But freedom of the press may turn the trial into a "Roman holiday."¹⁶¹ "The thrust of the press, moved by its imperatives for newsworthiness, salability, speed and excitement, is posed against the solemn, dispassionate, calculated rules of evidence and the punctilious rules of court."¹⁶²

¹⁴⁹ *Id.*; accord, *Estes v. Texas*, 381 U.S. 532 (1965).

¹⁵⁰ 384 U.S. at 363.

¹⁵¹ For a proposed remedial statute, see 18 W. RES. L. REV. 1376, 1383 (1967).

¹⁵² 384 U.S. at 358-63.

¹⁵³ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

¹⁵⁴ See *Craig v. Harney*, 331 U.S. 367, 374 (1947).

¹⁵⁵ See *Pollard v. United States*, 352 U.S. 354, 361 (1957); *Beavers v. Haubert*, 198 U.S. 77, 87 (1905); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846 (1957).

¹⁵⁶ *Irvin v. Dowd*, 366 U.S. 717 (1961) (impartially selected).

¹⁵⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁵⁸ U.S. CONST. amend. VI.

¹⁵⁹ *Pointer v. Texas*, 380 U.S. 400 (1965). See generally McKay, *The Right of Confrontation*, 1959 WASH. U.L.Q. 122.

¹⁶⁰ *Smith v. O'Grady*, 312 U.S. 329 (1941).

¹⁶¹ *State v. Sheppard*, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342, cert. denied, 352 U.S. 910 (1956).

¹⁶² A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 10 (1967).

If a fair trial is the most fundamental of freedoms, the State legislatures must provide more severe sanctions against irresponsible elements in the news media.¹⁶³ The present methods of coping with the problem are simply inadequate to ensure a fair measure of justice, at least in the potentially sensational trial.¹⁶⁴ A change in venue is not apt to be effective in a sensational case,¹⁶⁵ and it could be expensive and inconvenient for the defendant.¹⁶⁶ A continuance involves delay that deprives the defendant of a speedy trial in fact if not in theory.¹⁶⁷ This phenomenon is itself an example of first amendment spillover that disparages another constitutional right. Sequestration of the jury imposes a hardship on jurors to be sure; yet cautionary instructions are inadequate measures to guaranty that the jurors will refrain from exposing themselves to extrajudicial influences.¹⁶⁸ All of these problems attending current practices aimed at providing a fair trial would be solved, of course, if the dissemination of prejudicial information were prohibited. Should the State legislatures enact laws imposing strict penalties for the release or solicitation of prejudicial matter, and if the Supreme Court proved to be tolerant of such laws, then there would be some meaningful substance to the assertion that the fair trial is the most fundamental freedom. But the competitive freedom of the press will probably remain "preferred," and will continue to attenuate the substance of that assertion.¹⁶⁹

¹⁶³ See H. FELSHER & J. ROSEN, *THE PRESS IN THE JURY BOX* 237-39 (1966); 18 W. RES. L. REV. 1376, 1383 (1967).

¹⁶⁴ Although most newspaper publicity seems to take place at arrest (a time when trial is probably at least 6 months away), it is probably the more sensational trials that receive extended coverage of the kind that prejudices the accused. See A. FRIENDLY & R. GOLDFARB, *supra* note 162, at 61-62. See generally P. HOLMES, *THE SHEPPARD MURDER CASE* (1961); McCarthy, *Fair Trial and Prejudicial Publicity: A Need For Reform*, 17 HASTINGS L.J. 79 (1965) (Lee Harvey Oswald case discussion). Actually, prejudicial publicity is quite rare. A. FRIENDLY & R. GOLDFARB, *supra* note 162, at 71. It is an element of the *sensational* trial. *Id.*

¹⁶⁵ A. FRIENDLY & R. GOLDFARB, *supra* note 162, at 98.

¹⁶⁶ *Id.* at 100.

¹⁶⁷ *Id.*; see, e.g., *Mann v. United States*, 304 F.2d 394 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962) (necessary delay does not violate the right).

¹⁶⁸ See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

¹⁶⁹ All of the proposed remedies for effectively curbing press releases in the interests of a fair trial suffer from the characteristic that "they would arbitrarily restrict the flow of information about criminal cases and would enforce the restriction by criminal penalties." J. LOFTON, *JUSTICE AND THE PRESS* 261 (1966). The test for determining whether a contempt citation violates the freedom of the press was set down in *Bridges v. California*, 314 U.S. 252 (1941). The principle is "that the substantive evil must be extremely serious and the degree of imminence extremely high [a 'clear and present danger'] before utterances can be punished." *Id.* at 263. In light of the char-

Another example of first amendment freedom of the press spill-over carries beyond the trial. After a verdict of guilty is returned by a jury, inflammatory newspaper publicity may pressure a judge into imposing a harsher sentence than he otherwise would impose.¹⁷⁰ If the jury verdict was "not guilty," but the verdict of the press through pretrial and trial news reports and editorials was "guilty," the newspaper verdict may be more acceptable to the general public because the rationale supporting it is more widely known. Consequently, despite vindication by processes of law, the innocent defendant may suffer economic and social injuries as a result of public opprobrium. Obviously, harm of this kind cannot be cured by a reversal and a new trial. Notoriety once gained will not easily subside.¹⁷¹

In a different area of constitutional law, the Court has demonstrated a concern for the long range effects of public notoriety. In *Spevack v. Klein*,¹⁷² the Court held that an attorney cannot be disbarred solely because he has invoked the privilege against self-incrimination in an investigation of alleged misconduct. The Court reasoned that the penalty for exercising the constitutional right was too "costly."¹⁷³ Significantly, the consequences thought to be too "costly" in *Spevack* were loss of professional standing, reputation, and livelihood.¹⁷⁴ Whether the same considerations would provide the basis for upholding a law prohibiting inflammatory news reporting cannot be determined until such a case arises. But this is certain: nothing short of prohibition can ensure an innocent person that his right to be free from infamy, when found not guilty, will be respected.¹⁷⁵

acter of effective sanctions and the test for justifying an application of them, it is not likely that the Court will be tolerant of laws so restricting freedom of the press.

¹⁷⁰ See J. LOFTON, *supra* note 169, at 170-71. The fact that the eighth amendment prohibition against cruel and unusual punishment is not applied to the particular facts of an individual lawsuit, but is only applied to laws, is significant here. See *Robinson v. California*, 370 U.S. 660 (1962). The punishment prescribed by a judge for a particular defendant may be the product of public pressure and not of rational considerations. Such a punishment could be excessive as applied to that particular defendant, but not as a matter of law, since the law would authorize the punishment for the given crime.

¹⁷¹ "Sam Sheppard" (finally found not guilty) has become a household word — and as any Clevelander will attest, the public issue of his guilt or innocence will never be resolved. The fair trial-free press conflict, it seems, has been won by the press. Taylor, *Crime Reporting and Publicity of Criminal Proceedings*, 66 COLUM. L. REV. 34, 51 (1966).

¹⁷² 385 U.S. 511, 515 (1967).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 516.

¹⁷⁵ Waiver of the right to a jury trial does not cure the problem; the judge too is

Many features of the present trial make an assurance of a reasonably short trial duration impossible. The right to a speedy trial is consequently a very limited one. In fact, the Supreme Court has never held that there is a constitutional right to a *speedy* trial; it has only held that there can be no unnecessary or oppressive delay by the prosecution between the time of arrest and the *commencement* of trial.¹⁷⁶ Yet, short and expeditious criminal trials would be desirable: they would reduce the period of time in which the accused would be subjected to adverse, prejudicial news coverage, diminish the period of trauma for the defendant, and lower the costs of administration. To some extent trial speed could be accelerated without jeopardizing the accused's right to a fair trial.¹⁷⁷

The privilege against self-incrimination plays a part in stunting the growth of the right to speedy trial. The fact that the accused does not have to testify in open court (or submit to a lie detector test) necessitates an elaborate production of circumstantial evidence in most cases. Hence, trials drag on unbearably¹⁷⁸ while the prosecution connects the elements of its case in an effort to convince the jury.¹⁷⁹ Because the contested criminal trial is usually protracted, other criminal and civil contestants are forced to wait even longer for their trials on an already prodigious docket.¹⁸⁰ The perpetually

human and susceptible to prejudicial publicity. J. LOFTON, *supra* note 169, at 170. Further, the accused does not have an absolute right to waive a jury trial. *Singer v. United States*, 380 U.S. 24 (1965).

¹⁷⁶ *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Pollard v. United States*, 352 U.S. 354, 362 (1957) (delay must not be purposeful or oppressive); *Beavers v. Haubert*, 198 U.S. 77, 87 (1905); see Note, *supra* note 155. At the time of the adoption of the Constitution, the right to a speedy trial was well established and included only the period from arrest to trial; therefore, an historical analysis of the right discloses no justification for extending the right to include the trial. L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 380-85 (1947).

¹⁷⁷ The rules of criminal evidence could use some reform toward cutting down trial time. See Miller, *Beyond the Law of Evidence*, 40 SO. CAL. L. REV. 1 (1967).

¹⁷⁸ C. DICKENS, *BLEAK HOUSE* (Collier ed. 1964).

¹⁷⁹ Judge Warren Burger, noting that a typical trial in Denmark takes about 6 weeks, emphasizes that American trials often take from 3 to 6 years including several trials and appeals. *What to do About Crime in U.S.*, U.S. NEWS & WORLD REP., Aug. 7, 1967, at 70, 72 (the problems — a complex procedure, the jury, the fifth amendment). "When the American defendant is finally sentenced after this prolonged process, he has been engaged in bitter warfare with society for years . . . If he . . . is like most human beings, his battle with authority and in the courts develops a complex of hostilities long before he goes to prison." (examples — Chessman in California, Sheppard in Ohio).

¹⁸⁰ See AMERICAN ASSEMBLY, *THE COURTS AND THE LAW EXPLOSION* 110 (1965); B. BUCHHOLZ, H. KALVEN & H. ZEISEL, *DELAY IN THE COURT* (1959); Zeisel, *Delay by the Parties and Delay by the Courts*, 15 J. LEGAL ED. 27 (1962).

congested docket is alone the cause of another deplorable speedy trial problem. The pressure of the expanding docket has influenced courts in some jurisdictions to have a few judges hear "guilty plea" cases *en masse* — a depersonalized procedure that minimizes consideration for the individual defendants.¹⁸¹ The anomaly is clear: the exclusionary rule prevents an extension of the meaning of the speedy trial right so as to regulate the duration of the trial itself; the consequently elongated trial adds more weight to an already burdened docket; the docket necessitates large summary hearings in guilty plea cases — assembly line justice — with in-deliberate speed. Obviously the fifth amendment privilege cannot be blamed for all of this; the disparagement of a right to a speedy trial goes much further. Many factors tend to lengthen trials: for example, the impaneling of the jury, the presentation of motions for change of venue, exclusion of evidence, calling and swearing of witnesses, demonstrative evidentiary exhibits, long-winded lawyers, meddling judges, arguments, summations, the judge's charge and the jury's deliberation — all consume time. But the privilege is a contributor. How does the affront to human dignity that results from so much delay, concomitant newspaper, radio, and TV coverage, and personal defame measure up against the abrogation of the right not to accuse oneself? Sam Sheppard wanted to take a lie detector test administered by an impartial board.¹⁸² The State refused while insisting that police administer the examination. Had one side or the other had confidence enough to go forward with the examination, or had Sam Sheppard been examined within a few hours after the initial accusation and been found innocent, is it likely that he would have suffered such widespread public disrepute? The fact of arrest and opprobrious publicity seem to constitute greater affronts to human dignity than would a guarded and procedurally cured deprivation of the privilege against self-incrimination.

The accused's right to a fair trial before an impartial jury is also impaired, to some extent, by the fifth amendment privilege. It is all too clear that prejudice attends the defendant's failure to testify on his own behalf.¹⁸³ A frequent reason for not taking the stand

¹⁸¹ AMERICAN ASSEMBLY, *supra* note 180, at 111.

¹⁸² P. HOLMES, *supra* note 164, at 210.

¹⁸³ In *Griffin v. California*, 380 U.S. 608 (1965), the Court prohibited comment on the defendant's failure to take the stand. Although there is no intention here to challenge the wisdom of that decision, it is noteworthy that no effort was made (or at least not mentioned) to discover whether most juries would be harder on the defendant without comment than if there had been such comment.

is the accused's recidivist status. Possibly a rule of constitutional dimension, if there must be any rule of exclusion, would be better served by disallowing proof of prior conviction and permitting the accused to take the stand freely instead.

III. SCIENCE CHALLENGES CRIMINAL JUSTICE

A. *The Matter of the Mind*

"A crime is any social harm defined and made punishable by law."¹⁸⁴ It is usually composed of the concurrence of an evil intent and conduct causally related to that intent.¹⁸⁵ The concept of intent, unlike conduct, is not observable, and courts therefore resort to legal fictions to ascertain intent.¹⁸⁶ It is at least arguable that criminal trials should be conducted only on the issue of conduct.¹⁸⁷ Whether the mens rea issue is considered or not, the jury can be expected to identify with the defendant and to inject the morals of the community into the trial.¹⁸⁸ Even crime is not an absolute concept.¹⁸⁹

The concept of punishment, unfortunately, encompasses both the institution of "how we deal with offenders" and the particular sanction that is exercised against the offender.¹⁹⁰ The connotation of "punishment" emphasizes the sanction element and disparages ideas of curative treatment for dealing with offenders. This is unfortunate because it has made the social responsibility for cure easy to circumvent.¹⁹¹ There is a significant distinction between the labels "treatment" and "punishment": moral condemnation of the community attaches to "punishment," but not to "treatment."¹⁹² "Treatment" envisions the possibility of removing the concept of

¹⁸⁴ R. PERKINS, CRIMINAL LAW 5 (1957).

¹⁸⁵ *Id.* at 725-26. Intent, of course, may be constructive; therefore the mens rea element of a crime is more comprehensive than true intent. W. CLARK & W. MARSHALL, LAW OF CRIMES § 40 (4th ed. 1940). Intent must not be confused with motive. R. PERKINS, *supra* note 184, at 719.

¹⁸⁶ W. CLARK & W. MARSHALL, *supra* note 185, § 40; E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 13-14 (4th ed. 1947).

¹⁸⁷ T. SZASZ, PSYCHIATRIC JUSTICE 262 (1965).

¹⁸⁸ Hall, *Psychiatric Criminology: Is It a Valid Marriage? The Legal View*, 16 BUFFALO L. REV. 349, 353 (1967).

¹⁸⁹ See Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 989-90 (1940).

¹⁹⁰ Swartz, *Punishment and Treatment of Offenders*, 16 BUFFALO L. REV. 368, 373 (1967).

¹⁹¹ *Id.* at 375-76.

¹⁹² Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 405 (1958).

punishment from the sanction.¹⁹³ Progress in this direction is compatible with the growing recognition of the low status of the convict in society¹⁹⁴ and the need for differentiating between volitional crime and illness.¹⁹⁵

Insanity at the time of the crime prevents criminal responsibility of the actor under present theories,¹⁹⁶ if the insanity can be said to have caused the criminal act.¹⁹⁷ The difficulty with this theory is that, in a sense, all criminals are mentally ill.¹⁹⁸ Another difficulty lies in the fact that a psychiatrist who testifies cannot express his expert opinion as to what is wrong with the defendant and what should be done to treat him, but must give an opinion as to whether the defendant was criminally responsible for his act. This requires the psychiatrist to make a moral evaluation as to whether the defendant should be punished for his act.¹⁹⁹

The coming of the "therapeutic state"²⁰⁰ has shifted the emphasis from the punishment of moral guilt to the treatment of the criminal.²⁰¹ Unfortunately, the treatment furnished to an individual who is found not guilty by reason of insanity is often punishment in the guise of therapy.²⁰² Dr. Szasz points out that the defendant committed to a hospital, which is all but in name a prison, is there for an indeterminate period of time — that is, until cured.²⁰³

Cure is unlikely if no treatment is provided and the indeterminate sentence makes it possible to be relatively unconcerned about treatment. If the State were really concerned with providing treatment for criminals, it could do so in prisons²⁰⁴ and this proce-

¹⁹³ Graser, *Psychiatric Criminology: Is It a Valid Marriage? Further Considerations*, 16 BUFFALO L. REV. 364, 366 (1967).

¹⁹⁴ *Parker v. Ellis*, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting).

¹⁹⁵ *Robinson v. California*, 370 U.S. 660 (1962).

¹⁹⁶ C. JEFFERY, *CRIMINAL RESPONSIBILITY AND MENTAL DISEASE* 258 (1967).

¹⁹⁷ Jeffery has argued that both mental illness and crime are behavior and that both are dependent variables which are caused by some independent variable in the actor's environment. He has contended that mental illness cannot therefore be causative of criminal behavior. *Id.* at 226.

¹⁹⁸ *Id.* at 262; T. SZASZ, *LAW, LIBERTY AND PSYCHIATRY* 242 (1963). *But see* Hall, *supra* note 188, at 353.

¹⁹⁹ P. ROCHE, *THE CRIMINAL MIND* 249 (1958); T. SZASZ, *supra* note 198, at 130, 136.

²⁰⁰ Kitting, *The Divestment of Criminal Justice and the Coming of the Therapeutic State*, 1 SUFFOLK U.L. REV. 43, 53 (1967).

²⁰¹ *Id.* at 61.

²⁰² T. SZASZ, *supra* note 198, at 114. The Supreme Court has recognized this problem of punishment disguised as therapy in the juvenile court area. *In re Gault*, 387 U.S. 1 (1967).

²⁰³ T. SZASZ, *supra* note 198, at 114.

²⁰⁴ Dr. Szasz argues that "even if we accept the argument that many criminals are

dures would help make it possible to abolish involuntary mental hospitalization and thereby improve the climate for treatment of noncriminal mental patients.²⁰⁵

Optimally, the psychiatrist should be required to render his scientific diagnosis and to explain how he reached that diagnosis rather than to merely give an opinion on criminal responsibility which is basically a moral judgment.²⁰⁶ Because there is a lack of standards for mental health, the psychiatrist's opinion is not verifiable and must be judged on the authority of the psychiatrist.²⁰⁷

The trial of criminal cases raising the issue of insanity should be bifurcated.²⁰⁸ Everyone charged with a criminal offense should be tried on the basic factual issue: Was he the actor?²⁰⁹ If he is found to have been the actor, then society must take the steps necessary to protect itself from whatever risks there are that he will commit a similar offense in the future.²¹⁰ The psychiatrist's expertise could then be put to use at the disposition stage of the process and the trial would not involve the traditional battle of the psychiatrists on the issue of insanity.

This type of bifurcated trial has been subjected to constitutional objections in several States.²¹¹ The theory is that since intent is an element of nearly all crimes, the issue of sanity at the time of the crime is crucial to the determination of guilt.²¹² The point is

mentally sick, it does not follow that they should be in mental hospitals rather than in prisons. Mental hospitalization of offenders should not be, and cannot be, a substitute for prison reform." *Id.* at 230.

²⁰⁵ *Id.* at 226-29.

²⁰⁶ *Id.* at 130, 136; P. ROCHE, *supra* note 199, at 272.

²⁰⁷ T. SZASZ, *supra* note 198, at 130.

²⁰⁸ See text accompanying notes 56-63 *supra*.

²⁰⁹ This is the view taken by numerous authorities, both in law and psychiatry. See P. ROCHE, *supra* note 199, at 274 and authorities cited therein; T. SZASZ, *supra* note 187, at 262. It seems in accord with the idea that due process requires the State to prove the commission of some illegal act before incarcerating an offender even for treatment. Cf. *In re Gault*, 387 U.S. 1 (1967).

²¹⁰ This probably means incarceration, but hopefully in an enlightened, reformed prison where treatment directed particularly at criminals can be provided.

²¹¹ E.g., *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931) (due process clause of State constitution held to prohibit elimination of insanity as defense to murder); *State v. Lange*, 168 La. 958, 123 So. 639 (1929) (State constitution held to prohibit withdrawal of sanity issue from the jury but no constitutional objection to trial of insanity plea separately from guilt issue); *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910) (right to trial by jury guaranteed by State constitution held to include trial on sanity issue). A New York court has held that it was not bound by the finding of a psychiatric commission which examined defendant before trial and concluded that his act was produced by insanity at the time of the crime. The sanity issue was for the jury to decide. *People v. Whitman*, 149 Misc. 159, 266 N.Y.S. 844 (Ct. Gen. Sess. 1933).

²¹² H. DAVIDSON, *FORENSIC PSYCHIATRY* 9 (1965); see note 211 *supra*.

well taken but does not go to the heart of the bifurcated trial proposal. It would seem that the defendant could not complain if he were tried first by a jury (if he so elected), on the issue whether he committed the alleged act, and then, if found to have been the actor, were tried again before a jury on the issue of his sanity at the time of the crime.²¹³

A more rational and scientific procedure would permit a jury trial only on the issue whether the defendant committed the act. The sanity issue would then be decided by an impartial panel of experts, psychiatrists, and/or psychologists. The civil libertarian might argue that the defendant would thus be deprived of a jury trial on the issue of intent which is a critical element of the crime. This view is subject to attack on two levels. First, the defendant has had the benefit of trial by jury on the real issue which the criminal trial is to determine — whether the defendant was the actor. Once that issue is determined against him in the most reliable manner presently available, he should not be heard to complain since the sanity issue and the disposition questions will then be decided by the people with the most expertise in that area. Second, the problem of intent is an extremely complex and difficult one, and to include such a confusing issue in a trial designed to protect the accused can only muddy the waters.²¹⁴

The reason for such a procedure is that a modern trial, in order to reflect present-day concern for human dignity, must employ the most reliable means available to make these crucial decisions. The psychiatric panel must be impartial and not just State oriented. It would therefore be wise not to permit panel members to serve for long terms and there must be high qualifications and ethical standards set for panelists. There must be provision for judicial review of their decisions which would then be given the weight now given to other administrative determinations when cases are appealed to

²¹³ This could be done by permitting the same jury to hear both issues but at separate times, or by using two different juries. Using the same jury would be the less desirable alternative because it would involve some of the confusion of issues which the plan is intended to avoid. Using two different juries would be more expensive and more vulnerable to constitutional objections. Either plan might raise problems as to what kind of instructions could be given to the second jury and thus might raise problems analogous to those discussed in connection with *Griffin v. California*, 380 U.S. 609 (1965). See text accompanying notes 28-30 *supra*; 19 CASE W. RES. L. REV. 382 (1968).

²¹⁴ According to Dr. Roche: "A person commits an unlawful act and somehow he does so because he is willful, malicious and so forth. It should be clear that these abstractions explain nothing, have no independent existence and their usefulness is limited as a kind of paraphernalia in the rituals of guilt fastening." P. ROCHE, *supra* note 199, at 12.

the courts. The practice of hospitalizing an offender found to be mentally ill for an indeterminate period should be carefully examined. Perhaps this risk could be reduced by providing that neither punishment nor treatment can continue for more than a definite period of years — with length of commitment varying with the type of offense. At the end of that period, the person would be released unless the State could carry a heavy burden of proof and prove to a judge or a jury that the person represents a serious danger to society if released. The habeas corpus remedy would remain available for a person who is ready for return to society before the mandatory period ends or for the person who is not receiving the treatment which might prepare him for such a return, but such an incarcerated person would have the burden in either case.

The new system, if implemented, would present serious problems, but the law must not neglect them if the process is to balance the protection of society with individual rights and the elevation of human dignity.

B. *Narcoanalysis*

Brief mention should be made of the so-called "truth serums." Drugs such as scopolamine have been used for several years by police²¹⁵ and by psychiatrists²¹⁶ to facilitate interviewing and interrogation of subjects. The procedure begins with the injection of a drug and interrogation begins when the subject is generally disoriented, fumbles around for objects, and has mild hallucinations.²¹⁷ Although the drugs are supposed to bring out the truth,²¹⁸ assist the memory of amnesia victims,²¹⁹ and loosen up a suspect who is withholding evidence,²²⁰ their true value is dubious.²²¹ There is considerable risk that the subject will admit acts which he did not commit²²² and it is certainly possible for the subject to lie or withhold information.²²³

In addition to their questionable scientific standing, these drugs

²¹⁵ See J. ROLIN, *POLICE DRUGS* (1956).

²¹⁶ Saher, *Appendix to id.*

²¹⁷ Muehlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L.C. & P.S. 513, 516 (1951).

²¹⁸ *Id.* at 517.

²¹⁹ Macdonald, *Truth Serum*, 46 J. CRIM. L.C. & P.S. 259, 262 (1955).

²²⁰ Muehlberger, *supra* note 217, at 519.

²²¹ *Id.* at 524; Saher, *supra* note 216, at 182.

²²² Saher, *supra* note 216, at 176.

²²³ Macdonald, *supra* note 219, at 263.

present a very serious danger to individual liberties. The Supreme Court has strictly circumscribed police interrogation in recent decisions,²²⁴ and in light of *Townsend v. Sain*,²²⁵ seems unreceptive to experimentation with narcoanalysis in the administration of criminal justice.

Because of the limited value of these drugs and the great dangers they raise, the present reluctance to permit their use seems quite proper.²²⁶ The courts and legislators should not completely close their minds to narcoanalysis, however, because the procedure may be valuable in certain limited circumstances where the risks of abuse can be controlled, and because the techniques and the drugs may be improved to the point where reliability becomes high.

C. Polygraphy

The eminent trial attorney F. Lee Bailey has stated: "Professor Wigmore wrote, in 1923, that if science ever devises a physiological test of credibility, the law will run to meet it. That same year the Court of Appeals for the District of Columbia was confronted with such a test, and ran in the opposite direction."²²⁷ Mr. Bailey was referring to the case in which "lie detector" evidence was first rejected as evidence in a criminal trial.²²⁸ The results of polygraph examinations are still inadmissible "apart from an agreement and stipulation between the opposing parties to have an examination conducted and to permit the results to be considered in court . . ."²²⁹

Obviously, there is still doubt that the polygraph is a reliable means of determining whether the subject was lying. Professors Reid and Inbau, who are probably the world's leading polygraph experts, report that on the basis of their experience, the polygraph is very reliable when administered by an expert examiner.²³⁰ Their

²²⁴ E.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

²²⁵ 372 U.S. 293 (1963). The Court was concerned because it thought that any statements made while under the influence of such drugs could not be products of a "free intellect." *Id.* at 307-08.

²²⁶ There has been great reluctance to accept the results of the tests in evidence. Polen, *The Admissibility of Truth Serum Tests in the Courts*, 35 TEMP. L.Q. 401, 410 (1962).

²²⁷ Bailey, Book Review, 1 SUFFOLK U.L.REV. 137 (1967).

²²⁸ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

²²⁹ J. REID & F. INBAU, TRUTH AND DECEPTION 237 (1966). Reid and Inbau have argued for admissibility if the test is given by a qualified examiner. *Id.* at 257.

²³⁰ *Id.* at 234.

experience has been gained primarily in assisting the police with interrogations and their assertions are thus subject to question.²³¹

The polygraph could and should be utilized as a means of protecting the innocent from the opprobrium incident to arrest and criminal prosecution. It would be especially useful in cases likely to be attended by great publicity, but could also be a valuable protection of individual liberty in more mundane cases.

F. Lee Bailey argues that an accused should have the right to a polygraph examination conducted by impartial experts. He would permit the results of such an examination to be used only in favor of the accused.²³² This proposal seems consistent with the idea that our system is willing to permit some guilty persons to go free in order to protect the innocent. Such a plan would make it possible to protect the innocent accused from adverse publicity and prosecution²³³ which are often more serious risks than the risk of conviction.²³⁴ The experts would not be police technicians but highly qualified and impartial experts. Such experts are probably difficult to find today but, if the need for this system is publicly acknowledged, they could be trained.²³⁵

If such an examination exonerated the accused, he could be released quickly and the police could return to a warm trail. Under present procedures, the police investigations concentrate on seeking evidence to support a conviction of the suspect and, by the time he is acquitted, it is too late to effectively resume the investigation.

If the reliability of the polygraph technique develops to a very high level, society should consider requiring every accused to submit to an examination by impartial examiners. This type of procedure would raise constitutional objections based on the privilege against self-incrimination, but it may be the only way to get the maximum benefit from the system because of the reluctance of defense counsel to have their clients submit to such a test. The subsequent trial of persons for whom the test results indicate guilt or

²³¹ Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 714 (1961).

²³² Bailey, *supra* note 227, at 141.

²³³ See text accompanying note 182 *supra*.

²³⁴ It will be necessary to allow time for investigation before the test because the examiner must know the facts of the crime in order to effectively formulate the questions. J. REID & F. INBAU, *supra* note 229, at 10.

²³⁵ For a brief discussion of the necessary qualifications and training, see *id.* at 235. Police-oriented examiners are likely to be quite interested in obtaining confessions from their subjects. Reid and Inbau suggest how this can be done. *Id.* at 236-67. This is one reason why examiners must not be police biased. Most of today's examiners were police trained. Bailey, *supra* note 227, at 139.

are inconclusive would involve problems similar to the *Griffin* situation.²³⁶ The results would not be used as evidence against the accused, but jurors might eventually learn that all criminal defendants who go to trial have failed to pass a polygraph test. The question would then be how best to counteract their natural inferences. Counsel would again have to decide whether to have the judge instruct the jury that the test results were not to be considered by them or to allow nothing at all to be said. Hopefully, the jury will prove reliable enough so that the first course will be acceptable.²³⁷

The polygraph could then become a device which serves to elevate human dignity and assists the police in eliminating innocent suspects.

IV. CONCLUSION

The present criminal trial process leaves much to be desired. The reliability of the factfinding process is difficult to measure,²³⁸ and recent attempts to do so have not received the cooperation they deserve.²³⁹ The recent wave of constitutional decisions aimed at protecting the rights of the accused has had serious diseconomic consequences. New approaches are necessary if the trial is to combine the goals of truth determination and protection of the accused. Finally, scientific techniques such as psychiatry and polygraphy are not being optimally employed.

Hopefully, there will be a determined interdisciplinary effort to understand the present functioning of the criminal trial process. An immediate and extensive review of the process is necessary if law and science are to unite, as they must, to ensure justice and to elevate human dignity.

ALAN B. GEORGE
WILBUR C. LEATHERBERRY

²³⁶ See text accompanying notes 28-30 *supra*.

²³⁷ *Id.*

²³⁸ Professor Ovid Lewis discusses the problems involved. See Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528 (1968). Professor Kaplan has written a very important book on methodology which is "must" reading for researchers in this area. A. KAPLAN, *THE CONDUCT OF INQUIRY* (1964).

²³⁹ See notes 27, 55 *supra*.